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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

IN RE: OHIO RIVER DISASTER LITIGATION

IN THE MATTER OF THE COMPLAINT OF WALKER TOWING CORPORATION CONSOLIDATED WITH IN THE MATTER OF THE PETITION OF B-R RIVER SERVICES, INC.,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

JOINT PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the Appellate Court erred in holding that the U.S. Army Corps of Engineers' negligent violation of its own regulations for the passage of ice floes at locks and dams on the Ohio River was protected by the discretionary function exception found in the Federal Tort Claims Act, 28 U.S.C. Sec. 2680(a), and whether such holding conflicts with the decisions of this Court, particularly *Berkovitz v. United States,* ____ U.S. ____ 108 S.Ct. 1954 (1988).

2. Whether the federal courts have the authority to modify judicially the Suits in Admiralty Act, 46 U.S.C. §742 by engrafting onto that Act the discretionary function exception found in the Federal Torts Claims Act 28 U.S.C. §2680(a) when the SIAA does not contain such an exception, or does such authority rest solely with the Congress. The Circuit Courts of Appeal are in conflict on this issue. This important question of federal law has not been decided by this Court.

3. Whether the Appellate Court in reversing the judgment of the District Court violated the "clearly erroneous" standard of review in conflict with this Court's decision in *Anderson v. City of Bessemer City, N.C.,* 470 U.S. 564, 105 S.Ct. 1504 (1985) and other Supreme Court decisions interpreting Rule 52(a) F.R.Civ.P.

PARTIES

Walker Towing Corporation (Walker) is a privately held company and is not a subsidiary or affiliate of a publicly owned corporation. Continental Insurance Company and Home Insurance Company, part of the Home Group, Inc. (Parent) are the insurance underwriters for Walker Towing Corporation. Marine Office of America Corporation, a non-public corporation is the marine manager for Continental Insurance Company.

B-R River Services, Inc. (B-R) is a privately held company and is not a subsidiary or affiliate of a publicly owned corporation. Continental Insurance Company and St. Paul Fire & Marine Insurance Company are the insurance underwriters for B-R River Services, Inc. Marine Office of America Corporation, a non-public corporation is the marine manager for Continental Insurance Company. St. Paul Fire & Marine Insurance Company is a subsidiary corporation of the St. Paul Companies, Inc.

The Respondent is the United States of America, a sovereign nation.

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Petitioners Walker Towing Corporation and B-R River Services, Inc. respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on December 5, 1988.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 862 F.2d 1237 (6th Cir. 1988) (rehearing and rehearing en banc denied 1989). The opinion of the United States District Court for the

Southern District of Ohio, Western Division was not reported. Both Opinions and Order denying rehearing en banc appear in the Appendix hereto.

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on December 5, 1988 and a timely filed petition for rehearing en banc was denied on February 28, 1989. This petition for a writ of certiorari was filed within ninety days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

STATUTES INVOLVED

This matter involves the following statutes:

1. Suits in Admiralty Act (SIAA) 46 U.S.C. §742. (in pertinent part)

> "§742. Libel in personam
>
> In cases where if such vessel were privately owned or operated, or if such cargo were privately owned or possessed, or if a private person or property were involved, a proceeding in admiralty could be maintained, any appropriate nonjury proceeding in personam may be brought against the United States or against any corporation mentioned in section 741 of this title. . . ."

2. Federal Tort Claims Act (FTCA) 28 U.S.C. §2680(a) and (d).

> "§2680. Exceptions.
>
> The provisions of this chapter and section 1346(b) of this title shall not apply to —
>
> (a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in

the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

. . . . .

(d) Any claim for which a remedy is provided by sections 741-752, 781-790 of Title 46, relating to claims or suits in admiralty against the United States.

STATEMENT OF THE CASE

INTRODUCTION

During the early evening of January 27 and the morning of January 28, 1978, a massive ice gorge created by the U.S. Army Corps of Engineers' negligent operation of Markland Locks and Dam failed catastrophically and moved downriver, sinking and damaging towboats, barges and their cargoes causing what the District Court characterized as ". . . probably the greatest single disaster to hit the Ohio River in modern times." (A. 111)[1] The casualty spawned numerous lawsuits which were consolidated by the Judicial Panel on Multi-District Litigation. After a lengthy period of pretrial discovery exceeding four years, the two instant cases proceeded to trial.

These cases were filed in the District Court under the provisions of *Limitation of Vessel Owner's Liability Act,* 46 U.S.C. §181-195 and *Suits in Admiralty Act,* 46 U.S.C. §741-752, and stated claims within the federal maritime and admiralty jurisdiction.

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[1] References to the Appendix are shown as "A. ").

FACTS

The Markland Locks and Dam is located immediately downstream of a right-hand bend at Mile 531.5 on the Ohio River bounded by Kentucky and Indiana. The Markland Dam Pool (that segment of the Ohio River which the Markland Dam controls) extends approximately 95 miles upriver to Meldahl Dam and Locks at Mile 436.2 on the Ohio River. The United States Army Corps of Engineers (Corps) operates Markland, Meldahl, and all other dams on the Ohio River. Markland is operated under the authority of the Louisville District of the Corps while Meldahl is under the authority of the Huntington District. Both Districts were part of the Ohio River Division which supervised their activities.

Markland was designed and built as a navigation dam as opposed to a flood control dam. While it is sometimes referred to as a "non-navigable" dam, this means only that river traffic does not go through the dam itself but through locks at the dam and does not change its description and function as a dam built to assist navigation. It is a concrete structure with 12 tainter gates, all of which were designed and built so that they could be raised to allow water, ice and debris to flow under them and pass downstream. As originally constructed, five of the tainter gates were also submergible. they could be lowered to permit ice and debris to spill over and move downstream with the river current. However, vibration had been observed in similar gates installed in other dams on the Ohio River. Although no substantial problem had developed at Markland, the Corps disabled the submergible feature of the five gates prior to 1978, preventing the lowering of the gates to pass ice.

River traffic transits Markland by use of a 600 foot auxiliary lock closest to the Kentucky bank and the main 1,200 foot lock next to the auxiliary lock. On the Indiana side the dam contains a hydroelectric plant which is operated under contract by a private utility company. It utilized a portion of the river flow to

generate electricity sold by the company for public consumption. The lockmaster at Markland controlled the amount of available river flow allocated for use to generate electricity rather than for navigation.

There remained three methods of passing ice through Markland after the immobilization of the submergible feature of five gates at the dam. One method was to pass ice through the auxiliary lock. However, this method had been unavailable for 18 months and particularly during the crucial period in January 1978, because of the Corps' failure to maintain and repair one of the lock's miter gates (A. 44, 139).

Another method for passing ice at Markland involved the use of the emergency leaf of the main lock. But the Corps had discouraged its use because of a design defect (A. 44).

The only operable means to pass ice at Markland in January 1978 was to raise the tainter gates to permit passage of ice under the gates. Experience had shown that to pass ice, two adjacent gates had to be raised about 12 feet off the sills upon which they rested 35 feet below the river surface.

After a study of the problem caused by running ice at the dams including Markland, the Corps issued regulations to govern operation in ice conditions.

The District Court found that two regulations issued by the Corps prior to the casualty comprised the Markland Ice Operation Plan ("Ice Plan") during January 1978 (A. 51-53, 137); a Regulation dated February 7, 1964 (Exh. 211) and Division Circular No. 16-58 (Exh. 113(B)), both of which appear in the Appendix. These regulations emphasize the importance of passing all moving ice through the dam as it arrives rather than allowing ice to pile up against the dam.

The 1964 regulation (Exh. 211) first specifically identifies the hazard which it was promulgated to avoid:

> "Failure to pass one-inch thickness of ice can form a serious gorge, and such has happened on one occasion through operational failure to provide passage of it."

and then states the solution for the problem:

> "Nonmoving sheet ice gives no problem. It is only when ice starts to move under natural conditions (and efforts to move otherwise are of little effect) that hazard is created. *The only safe operation then is to pass all ice through the dam as it arrives and to have essential provisions for such passage.*" (Emphasis added.)

Exh. 113(b) dated October 14, 1958 contained four requirements relevant to the ice problems in January 1978. It required that (1) ice in the lock approaches be broken and passed to the lower pool to maintain access to the locks; (2) navigators be warned of danger created by ice in the pool; (3) ice patrols be established to survey the pool during periods when ice formation was probable; and (4) the Ohio River Division to coordinate between districts.[2]

In January 1978, the Corps' negligent violation of these operational regulations caused an ice gorge to form and fail catastrophically.

On January 15, 1978 scattered running ice appeared at Markland. By January 16, the river was 80% covered at Markland and 100% covered by January 18 with ice 4 inches thick, extending upriver out of sight of the dam. From January 18 through January 27, Markland consistently reported 100%

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[2] The Government contended that these two regulations were superseded by a memorandum dated January 23, 1978 (Exh. 113a set forth in the Appendix). For various reasons the District Court found that the memorandum of January 23, 1978 was inapplicable on January 27, 1978, the date of the casualty. (A. 51, 125) In any event, the January 23 memorandum, largely reiterated the policies and procedures outlined in the Ice Plan embodied in Exhs. 113b and 211.

ice coverage which extended ultimately 26 miles upstream of the dam. From the 16th to the 27th, flows at Markland ranged from 130,000 cfs to 87,000 cfs which were sufficient to pass ice. During this time, the power plant never consumed less than 20,000 cfs and on January 23-26, operated at full capacity.

The personnel at Markland failed to pass the accummulating ice as required by the Ice Regulations (A. 137). They did not raise the tainter gates to the configuration necessary to pass ice until January 25 when it was too late to alleviate the situation.

Because of the failure of Markland to pass ice as it arrived at the dam, the ice jammed at Markland and began to progress or propagate upriver, bridging the river and gaining support from the banks. At some point on January 26, 1978, the ice formed a gorge at or about Mile 515-517 above Markland (A. 107). A gorge is, in effect, an ice dam which severely restricts the flow of water downstream.

On January 22, the M/V AGNES MAE, owned and operated by Petitioner Walker, entered the Markland Pool with its tow of barges owned by others and made its way downstream. On January 27, the tow was stopped upstream from Markland at or about Mile 516.5.

During the late evening hours of January 25, 1978 and continuing through most of January 26, a storm hit the Ohio Valley including the Markland area. The storm did not cause the gorge (A. 130). As the river rose, a differential head of 3-5 feet of water was pent up behind the gorge on January 26. At 4:17 p.m. on the 27th of January 1978, the gorge which reached from Mile 515 upstream to at least Mile 511 broke. The tremendous power created by the breaking of the gorge carried barges and towboats, including the M/V AGNES MAE in its path downstream to Markland. Huge chunks of ice sometimes the size of a barge (195 feet by 35 feet) moved downstream at a speed of 4 to 5 miles an hour. Various barges in the tow of the M/V AGNES MAE were sunk or damaged and their cargoes were lost.

B-R maintained an "upper" and "lower" fleet of barges which were moored to the shore with polypropyl lines and wire cable. It was located on the Kentucky shore of the Ohio River in the Louisville Harbor. The Court found that on Saturday morning, January 28, 1978, a "shock wave" of water, and the major portion of the ice floes from the ice gorge above Markland Dam, hit the Louisville Harbor. Ice was flowing in the river from shore to shore with ice floes 2-3 feet high and "as long as a football field." (A. 120) At approximately 11:35 a.m. on the morning of the 28th, the B-R upper fleet broke away from the shore when the lines parted. The upper fleet in turn struck the lower fleet, breaking it loose from its moorings.

Walker settled with its claimants for $1,500,000 and B-R settled with its claimants for $1,423,299.00. Both then sought indemnity under the Suits in Admiralty Act, 46 U.S.C. §742.

The trial court in a lengthy opinion found that the Corps of Engineers was guilty of eight separate acts of negligence (A. 137-142), none of which was protected by the discretionary function exception; including: (1) Failure to conduct periodic inspections of the Markland Pool when it knew that severe ice conditions were developing; (2) Failing to pass floating ice at Markland Dam as it arrived at the dam, through use of the underflow gates or otherwise; (3) Failing to restrict the amount of water being diverted to the hydroelectric plant so that additional flow would be available to the dam for ice passing efforts; (4) Failing to perform necessary maintenance to ensure that the auxiliary chamber emergency leaf would be available for reasonably forseeable passing of ice; (5) Permitting the tender boat to become frozen in the auxiliary chamber, thus foreclosing use of that chamber for passing ice once the latching pin was replaced; (6) Failing to train lock personnel in available means of passing ice at low flows; (7) Failing to coordinate efforts between Markland Locks and Dam and facilities upstream of Markland, particularly Meldahl with regard to the continuous passage of ice through Meldahl into the Markland Pool; (8)

Failing to maintain Markland in a condition which would (following the incapacitation of the submergible tainter gates) permit underflow passage of ice at relatively low flows.

In essence, the District Court found that the Corps did not follow its Ice Regulations when it failed to pass the ice as it arrived at Markland Dam and failed to have "essential provisions" for such passage.

The District Court entered judgment for Walker for the full amount of $1,500,000. Finding that B-R was 60% contributorily negligent, it awarded B-R judgment in the amount of $569,319.60.

In reversing these judgments, the Court of Appeals found that some of the District Court's findings of negligence were protected by the "discretionary function exception." These included (1) the decision of the Corps not to cut back flow to the hydroelectric plant, (2) the failure to coordinate operations between Markland and Meldahl, (3) the failure of Markland to pass ice as it arrived at the dam and (4) the Corps' failure to compensate for the immobilization of the submergible tainter gates by maintaining the structure in a condition that would permit underflow passage of ice at relatively low flows. The Court held that the remaining negligent acts (listed above) standing alone were not substantial factors in causing the disaster, and accordingly, causation no longer existed. The Appellate Court did not rule upon or mention the Regulations that made up the Ice Plan.

REASONS FOR GRANTING THE WRIT

I.

The Appellate Court opinion determining that the Acts of the United States Army Corps of Engineers which were in violation of its own regulations and policy were protected by the "discretionary function" exception, was in conflict with this Court's decision in *Berkovitz v. United States*, ____ U.S. ____ 108 S.Ct. 1954 (1988) and other applicable decisions.

In *Berkovitz v. United States*, ____ U.S. ____, 108 S.Ct. 1954 (1988), this Court restated and clarified the contours of conduct protected by the discretionary function exception contained in the FTCA, 28 U.S.C. §2680(a). The crux of *Berkovitz* was its recognition that regulations under which an agency operates must be examined to determine whether the challenged conduct of government employees is actionable (nondiscretionary) or "discretionary", thereby immunizing the government from culpability.

> "In examining the nature of the challenged conduct, a court must first consider whether the action is a matter of choice for the acting employee. This inquiry is mandated by the language of the exception; conduct cannot be discretionary unless it involves an element of judgment or choice.... Thus, the discretionary function exception will not apply when a federal statute, regulation or policy specifically prescribes a course of action for an employee to follow. In this event, the employee has no rightful option but to adhere to the directive. And if the employee's conduct cannot appropriately be the product of judgment or choice, then there is no discretion in the conduct for the discretionary function exception to protect. [citations omitted] *Id.* at ____ U.S. ____, 108 S.Ct. at 1958-59.

This Court's opinion in *Berkovitz* traces back to *Griffin v. United States*, 500 F.2d 1059 (3rd Cir. 1974). *Griffin* involved a

suit against the United States for injuries sustained by the Plaintiff when she ingested polio vaccine. The Third Circuit considering virtually the identical regulations at issue later in *Berkovitz* concluded that the determination of whether a particular lot of polio vaccine met the neurovirulence standard of a regulation which governed whether the lot could be released for distribution, did not involve a discretionary function.

Ten years later, *United States v. S. A. Empresa de Viacao Aerea Rio Grandense, (Varig)* 467 U.S. 797, 104 S.Ct. 2744 (1984), considered a comprehensive regulatory scheme established by the Federal Aviation Administration (FAA) to insure that aircraft manufactured by private concerns met government safety requirements. This Court held that the FAA's choice in creating a regulatory scheme was protected by the discretionary function exception. It also held that the regulation which empowered employees of the FAA to exercise independent judgment with respect to the number of spot checks they would perform at the plants of various aircraft manufacturers was discretionary, since it did not mandate the number of inspections to be made, but left the choice to the agency employee.

Two years after *Varig*, the Third Circuit was confronted with the appeal in *Berkovitz v. United States*, 858 F.2d 122 (3rd Cir. 1987) which concerned the same regulations regarding the release of polio vaccine for public consumption as were considered in *Griffin v. United States, supra.* The panel in *Berkovitz* concluded that *Varig* had undermined the reasoning employed in *Griffin v. United States, supra.* Analyzing the regulations in light of *Varig*, it concluded that the acts of the employees of the Division of Biologic Standards (DBS) were discretionary and affirmed dismissal of the suit against the government.

This Court in a unanimous opinion reversed the Third Circuit. It rejected the government's argument that the discre-

tionary function exception precluded liability for all acts arising out of regulatory programs of federal agencies and reaffirmed previous holdings that the exception did not foreclose liability for the performance of "uniquely governmental functions." After examining the regulations, it concluded (1) that agency employees had no discretion to grant a license to the drug manufacturer without first receiving all data required by the regulation prior to issuance of the license and (2) since the Bureau of Biologics had adopted a policy of testing all vaccine lots and preventing the distribution to the public of lots that failed to comply with the regulations' standards, the government could be liable for the release of vaccine which failed to comply with regulation standards concerning its release.

The conflict between the dictates of *Berkovitz* and the opinion of the Sixth Circuit in the instant case is stark and obvious. *Berkovitz* mandates that the regulations and policies adopted by an agency to govern the actions of its employees be analyzed to determine whether the challenged conduct is discretionary. The Court of Appeals not only failed to examine the regulations which required the Corps to take measures for locks and dams to pass ice moving under natural conditions; it made no mention of them in its opinion.

The District Court determined as a matter of fact that two regulations expressed the Corps' ice management policy at the time of the events leading to this casualty.

> "The only Corps 'ice plan' which was available to Markland personnel during the period prior to January 25, 1978, provided that:
>
> > [i]t is apparent . . . that operations to preclude ice hazards should be clarified. Non-moving sheets of ice give no problems. It is only when ice starts to move under natural conditions (and efforts to move otherwise are of little effect) that a hazard is created. *The only safe operation then is to pass all ice through the*

> *dam as it arrives, and to have essential provisions for such passage.* Exhibit 211 at 1 (emphasis supplied). (A. 137-138)

This factual determination by the District Court was not overturned by the Court of Appeals. The District Court's finding that ice was moving under natural conditions, the predicate for compliance with the ice regulations, was undisturbed by the Court of Appeals.

The ice regulations and ice plan were devised to avoid the very type of casualty that occurred. Nevertheless, the appellate panel ignored the regulations and characterized the decision of whether or not the moving ice should be passed as a discretionary decision balancing the structural integrity of the dam against the need to pass ice. This characterization failed to consider the regulation's directions (Exh. 211) on use of the tainter gates to assure passage of ice, and the Corps' determination that the risk of scour or erosion did not preclude short periods during which flow could be concentrated under adjacent gates to pass ice through the dam. Nor did it recognize the alternative provided by the regulation of raising the nonsubmergible gates and skimming ice over bulkheads placed in front of the gates. The regulation did not mandate use of one method or the other, but it did require that one of the two methods be used to pass moving ice to avoid its impoundment in front of the dam and its propagation upstream which might cause an ice gorge such as occurred in this case.

The Sixth Circuit's failure to examine the conduct of Corps employees at Markland Dam in light of pre-existing policy judgments by superiors in the Lousiville District Office, gave it false liberty to characterize failure to restrict flow to a power plant at Markland (an act which the District Court determined to be negligent) as "protected discretionary conduct." This conclusion necessitated weighing the testimony of live witnesses

to circumvent particular findings of fact by the District Court regarding the authority of the lockmaster at the time in quesion. It also failed to recognize the predominant policy determination of the Corps that moving ice be passed as it arrived at the dam to avoid the specter of an ice gorge being formed above the dam.

The Sixth Circuit's disregard of the regulation's requirement that Ohio River division (ORD) personnel coordinate ice passing activities between the Louisville and Huntington Districts allowed it to label this fault as "protected discretionary conduct." Its perception that ORD personnel exercised their oversight authority by doing nothing when Huntington District personnel refused to cease passing ice from the Meldahl pool into the Markland pool, is incomprehensible. As the District Court noted, at the least, Markland should have been advised of Meldahl's decision to continue passing all of its ice into the Markland Pool so that Markland could take steps in light of such a decision (A. 85).

The final fault which the Sixth Circuit determined was discretionary was the Corps' failure to make up for immobilization of the submergible gates at Markland. Here again, the Appellate Court's decision to ignore the regulation's mandate to "have essential provisions for such [ice] passage" (Exh. 211) left it free to evaluate this conduct outside of the framework of the regulations in direct disregard of this Court's holding in *Berkovitz*. In actuality, the Corps' policy of passing moving ice contemplated use of the nonsubmergible gates either alone or in conjunction with use of the emergency bulkheads.

In summary, the negligence which the Sixth Circuit concluded was discretionary violated the regulations that governed operations at Markland during ice conditions. This ruling conflicts with *Berkovitz* and requires that the decision of the Sixth Circuit be reversed.

II

The Appellate Court erred in determining that the discretionary function exception contained in the Federal Tort Claims Act, 28 U.S.C. §2680(a) (FTCA) should be engrafted onto the Suits in Admiralty Act, 46 U.S.C. §742 (SIAA) which contains no such exception. This Court should address the important questions of the breadth of the waiver of sovereign immunity in the SIAA, the interface, if any, between the discretionary function exception of the FTCA and the SIAA and resolve the conflict among the Circuit Courts of Appeal on this issue.

1. Congressional Waivers of Sovereign Immunity

Historically, sovereign immunity barred tort suits against the United States. Congress acted first in the maritime field to waive sovereign immunity by passing the SIAA, 46 U.S.C. §741-52 (1920), which waived sovereign immunity for admiralty damage claims arising out of the use of government owned vessels as merchant ships. Five years later, in related legislation, Congress extended its original waiver of sovereign immunity in the SIAA to nonmerchant vessels, such as naval craft, in the Public Vessels Act (PVA), 46 U.S.C. §781 (1925). See *Canadian Aviator v. United States*, 324 U.S. 215, 65 S.Ct. 639 (1945). Neither the SIAA nor the PVA contained an exemption for discretionary functions.

Twenty-one years elapsed before Congress passed legislation which waived sovereign immunity for nonmaritime common law torts. In the Federal Tort Claims Act (FTCA), 28 U.S.C. §2674 (1946), Congress authorized claims against the United States for the negligence of government employees acting in the course of their employment under circumstances where a private person would be liable. Unlike the SIAA, Congress expressly limited the waiver of sovereign immunity in the FTCA by enumerating specific exceptions to liability. 28 U.S.C. §2680. Only two of those exceptions are relevant here; subsection "a" which exempts liability for discretionary functions and subsec-

tion "d" which states that the provisions of the FTCA do not apply to claims for which a remedy is provided in the SIAA and the PVA.

Subsequent to the passage of the FTCA, Congress amended the SIAA. The 1960 amendment to 46 U.S.C. §742 broadened its coverage to permit tort suits not only in instances where private vessels or private cargo were involved, but also suits where "if a private person or property were involved, a proceeding in admiralty could be maintained . . ." 46 U.S.C. §742. In effect, the SIAA was amended to encompass all maritime torts. Although Congress had included a discretionary function exception in the FTCA in 1948, no such exception was incorporated into the SIAA, as amended in 1960.

2. Rules of Statutory Construction

The rules which govern interpretation of federal statutes have been set forth in numerous cases and were succinctly summarized by this Court in *United States v. James*, 478 U.S. 597, 106 S.Ct. 3116 (1986).

> "The starting point in statutory interpretation is 'the language of the statute itself.' '[W]e assume that the legislative purpose is expressed by the ordinary meaning of the words used.'
>
> * * *
>
> We have repeatedly recognized that '[w]hen . . . the terms of a statute [are] unambiguous, judicial inquiry is complete, except in 'rare and exceptional circumstance.' In the absence of a 'clearly expressed legislative intention to the contrary,' the language of the statute itself 'must ordinarily be regarded as conclusive.' " (Id. at 478 U.S. 604, 606, 106 S.Ct. at 3121-3122)

See also *Immigration and Naturalization Service v. Cardoza-Fonseca*, 480 U.S. 421, 107 S.Ct. 1207, 1224 (1987) (Scalia, J.

concurring) "Judges interpret laws rather than reconstruct legislators' intentions. Where the language of those laws is clear, we are not free to replace it with an unenacted legislative intent."

Application of these solidly entrenched rules of statutory construction readily discloses the flaw of judicially engrafting the discretionary function exception onto the SIAA. Congress plainly intended and, in fact, created two independent statutory schemes to permit tort claims against the United States. In one, the FTCA, it preserved immunity for discretionary acts or functions. Yet, the very same section of the FTCA which contains the discretionary function exception, Section 2680, specifically states that the FTCA "shall not apply to claims for which a remedy is provided" under the SIAA. 28 U.S.C. §2680(d).[3]

Congress was explicitly aware of the discretionary function exception when it amended the SIAA in 1960 to broaden its scope to include allowance of suits against the United States in instances where a suit could be brought if a private person or property were involved. However, it chose to expand the scope of the SIAA to all maritime torts without exempting liability for discretionary acts. Had Congress wished to foreclose suits in admiralty against the United States on the basis of the discretionary function, it could easily have included the exception in the SIAA, just as it did in the FTCA. Nothing in the legislative history supports the argument that Congress intended to im-

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[3] The House of Representatives' report on the FTCA referred to the remaining exceptions of Section 402 (28 U.S.C. §2680) in the following paragraph. "The other exemptions in Section 402 relate to certain governmental activities which should be free from the threat of damage suits, *or for which adequate remedies are already available.* These exemptions cover claims arising out of the loss or miscarriage of postal matter; the assessment or collection of taxes or assessments; the detention of goods by customs officers; *admiralty and maritime torts*; deliberate torts such as assault and battery; and others." *H. Rep. No. 1287, 79th Cong., 1st Sess. p. 6 (emphasis supplied).*

munize the United States from suits in admiralty based on negligent discretionary acts of its employees. The Senate report pertaining to the 1960 amendments reveals that the purpose of amending the original SIAA was to permit transfer of cases between district courts and the Courts of Claims and to clarify the language of the original act which conferred jurisdiction over admiralty and maritime claims to the district courts.[4]

Unlike the legislative history to the FTCA, which contains particular discussion of the discretionary function exception and the need for its incorporation into the bill finally passed, no discussion of the exception is found in the legislative history discussing the 1960 amendments to the SIAA.

Recognition of the different spheres in which the FTCA and the SIAA apply provides ample reason to avoid judicially importing the discretionary function exception into the SIAA. The FTCA subjects the United States to suit based on whether a cause of action is recognized under state law. Thus, when Congress considered abrogating sovereign immunity for non-maritime common law torts, it was confronted with the possibility that 48 different state legislatures or court systems might create causes of action which could adversely affect activities of the United States. Various states might create broader

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[4] "The new Section 3, which clarifies the language of the first or jurisdictional sentence of Section 2 of the Suits in Admiralty Act (41 Stat. 525; 46 U.S.C. 742), was suggested by the Department of Commerce and endorsed by the Maritime Law Association. Its purpose is to prevent the repetition of misfilings in the future. It restates in brief and simple language the now existing exclusive jurisdiction conferred on the district courts, both on their admiralty and law sides, over cases against the United States which could be brought in admiralty if private vessels, persons, or property were involved. The purpose of the bill, as amended, is to authorize the transfer of cases between the U.S. District Courts and the Courts of Claims, and vice-versa. The bill also clarifies confusing language now existing in Section 2 of the Suits In Admiralty Act (41 Stat. 525, 46 U.S.C. 742)." *S.Rep.No. 1894, 86th Cong., 2nd Sess. p. 1 (1960).*

waivers of sovereign immunity against their own governmental agencies, which would apply to suits against the United States under the FTCA. The discretionary function exception was necessary to protect against such an eventuality.

Conversely, the SIAA waived immunity in maritime matters, an area historically a concern of the federal government. *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149, 40 S.Ct. 438 (1920). Under the SIAA, the governing body of law is the general maritime law of the United States as formulated by the federal courts, statutes passed by Congress, and regulations issued pursuant to statutory authority. Since federal law controlled maritime claims against the government, Congress could and by legislation, has in the past, precluded imposition of liability on the government even when those actions impact on maritime interests. *See e.g. Flood Control Act of 1928*, 33 U.S.C. §701 *et seq*; Dam Inspection Program, 33 U.S.C. §467 *et seq.*

Moreover, Congress has shown no hesitancy in providing the discretion, if any, which it desired for particular government agencies which may interact with private maritime interests. See e.g. *Faust v. South Carolina State Highway Dept.*, 721 F.2d 934 (4th Cir. 1983) *cert denied*, 467 U.S. 1226, 104 S.Ct. 2678 (1984). Statutes authorizing but not mandating the Coast Guard to undertake certain activities do not create a legal duty to undertake such acts if it chose not to do so. For example, statutes pertaining to the Coast Guard provide that it "may," but need not, establish aids to navigation, 14 U.S.C. §81; "may," but need not mark sunken vessels or other obstructions in navigable waters for the protection of navigation, 14 U.S.C. §86; "may," but need not, render aid to persons and protect and save property at any time and at any place, 14 U.S.C. §88. Similarly, the Corps of Engineers is authorized but not required to prescribe regulations regarding dumping refuse in navigable waters; 33 U.S.C. §419. An agency's decision under these acts not to undertake a specific action is regarded as discretionary.

Absent a statutory mandate to act, liability is precluded on the basis of the absence of any duty. See *Faust v. South Carolina State Highway Dept., supra.* Conversely, once the agency chooses to act, its implementation as authorized by statute must be carried out reasonably so as to avoid harm to private maritime interests. *Drake Towing Company, Inc. v. Meisner Marine Construction*, 765 F.2d 1060 (11th Cir. 1985); *Eklof Marine Corp. v. United States*, 762 F.2d 200 (2nd Cir. 1985).

Section 1 of Article I of the Constitution vests legislative powers exclusively in Congress, not in the federal courts. Proper statutory interpretation and deference to the acts of a co-equal branch of government militate against amending the SIAA by judicial action to incorporate the discretionary function exception of the FTCA. Previous decisions of this Court considering the exemptions to liability contained in the FTCA have concluded:

> "There is no justification for this Court to read exemptions into the act beyond those provided by Congress . If the Act is to be altered that is a function for the same body that adopted it."

Rayonier, Inc. v. United States, 352 U.S. 315, 320, 77 S.Ct. 374, 377 (1957). *Accord: United States v. Muniz*, 374 U.S. 150, 166, 83 S.Ct. 1850, 1859 (1963).

Consistent interpretation of statutes waiving governmental immunity mandates that an identical approach be followed in construing the SIAA. Congress expressed its will in the language of the statute. The judiciary's function is to give effect to the law Congress passed, not rewrite the statute. The role of the judiciary in this context was best described by Chief Justice Berger in *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 98 S.Ct. 2279 (1978):

> "Our individual appraisal of the wisdom or unwisdom of a particular course consciously selected by the Congress is to

be put aside in the process of interpreting a statute. Once the meaning of an enactment is discerned and its constitutionality determined, the judicial process comes to an end. We do not sit as a committee of review, nor are we vested with the power of veto."

3. The Conflict Among the Circuit Courts of Appeals.

Lane v. United States, 529 F.2d 175 (4th Cir. 1975), adopts a construction of the SIAA consistent with controlling rules of statutory interpretation. In rejecting the government's assertion that the discretionary function exception of the FTCA must be implied into the SIAA, the Fourth Circuit held:

> "This action, however, is brought not under the Tort Claims Act, but under the Suits in Admiralty Act. 46 U.S.C.A. §742 was amended in 1960 to subject the United States to libels *in personam*, not just when a government's own vessel or cargo was involved but in every situation in which, if a private person were involved, a proceeding in admiralty could be maintained. It contains no discretionary function exception, and the Tort Claims Act contains a specific exception of claims for which the Suits in Admiralty Act provides a remedy. Thus, it is clear that this action could not have been brought under the Tort Claims Act, and it is properly maintainable under the Suits in Admiralty Act, which is an effective waiver of sovereign immunity.
>
> There is no basis upon which we can import the many exceptions in the Tort Claims Act into the Suits in Admiralty Act, where the United States is to be held accountable in admiralty whenever a private person, in similar circumstances, would be. (Id. at 179.)

Lane continues to be the law of the Fourth Circuit.[5]

Six Courts of Appeal, while recognizing explicitly or implicitly, that the SIAA contains no discretionary function exception, nevertheless elected to engraft judicially the exception contained in the FTCA. See *Wiggins v. U.S. through the Department of the Army,* 799 F.2d 962 (5th Cir. 1986); *Williams v. United States*, 747 F.2d 700 (11th Cir. 1984); *Gemp v. United States*, 684 F.2d 404 (6th Cir. 1982); *Estate of Callas v. United States*, 682 F.2d 613 (7th Cir. 1982); *Canadian Transport Co. v. United States*, 663 F.2d 1081 (D.C. Cir. 1980); *Gercey v. United States*, 540 F.2d 536 (1st Cir. 1976). The remaining five Circuit Courts of Appeal have not addressed this issue.

Walker and B-R respectfully submit that this Court should grant certiorari to decide this important question of the extent of the government's waiver of immunity in maritime matters, the interface, if any, between the SIAA and the FTCA, and resolve the still existing conflict among the various Courts of Appeals.

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[5] *Faust v. South Carolina State Highway Dept.*, supra, is not inconsistent with the holding in *Lane* that the discretionary function exception of the FTCA should not be implied into the SIAA. *Faust* involved a collision with a ferry guide cable which had been authorized pursuant to 33 U.S.C. §403, while *Lane* involved a collision with a wrecked vessel in the Intracoastal Waterway bordering Virginia. *Faust* held that Sections 81 and 86 which allowed the Coast Guard to establish and operate aids to navigation and mark sunken vessels for the protection of navigation, did not create a legal duty to mark an authorized obstruction, such as a guide cable. Similarly, 33 U.S.C. §403 which required a permit from the Secretary of the Army before any obstruction may be built in a navigable waterway, did not create a legal duty upon which liability could be predicated. *Faust* was decided upon the absence of a duty. *Lane* concluded that there was no discretionary function immunity and that the question was one of liability. *Lane's* holding that the discretionary function exception contained in the FTCA is not implicitly contained in the SIAA remains the law of the Fourth Circuit.

III.

The Court of Appeals for the Sixth Circuit failed to adhere to the "clearly erroneous" doctrine and fashioned its own findings of fact to support its findings that the "discretionary function" exception applied.

Thirty-seven years after *United States v. United States Gypsum Company*, 333 U.S. 364, 68 S.Ct. 525 (1948) in which this Court considered and defined the scope of appellate review of district court findings of facts under the clearly erroneous standard of Rule 52(a) F.R.Civ.P., it decided *Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 105 S.Ct. 1504 (1985). *Anderson* reviewed the history of Rule 52(a) and exhaustively set out the standards for appellate review. The primary thrust of *Anderson* was to stress the limited role of appellate courts when the district court's findings of facts were challenged. Review was not, as this Court cautioned, *de novo*, since the "clearly erroneous" standard "does not entitle a reviewing court to reverse the finding of a trier of fact simply because it is convinced that it would have decided the case differently." *Id.* at 573, 105 S.Ct. 1511. The role of sifting the evidence and weighing competing testimony is the province of the district court. Where there is evidence to support the district court's findings, the appellate court is not free to overturn them.

> "If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. *Where there are two permissible views of the evidence, the fact-finder's choice between them can not be clearly erroneous.*" (Emphasis added) *Id.* at 573, 574, 105 S.Ct. 1511.

Anderson is particularly applicable to the case at bar. The instant case took 5 weeks of trial time spread over a period of approximately a year. The evidence consisted of thousands of

pages of deposition testimony, nineteen witnesses who testified in court and hundreds of documents. The District Court's opinion was 138 pages in length, of which over 90 pages involved the complex factual situation appearing from the evidence.

The appellate opinion is a paradigm of *de novo* review in violation of Rule 52(a) F.R.Civ.P. In effect, the Appellate Court reversed and reshaped those factual findings of the trial court which the Appellate Court found necessary to support its view that the acts of the Corps producing the casualty were immunized by the discretionary function exception.

A clear issue of credibility was posed by the evidence regarding the hydroelectric plant. The District Court made factual findings that the Lockmaster Sheldon had the authority to cut back the flow without consulting his superiors (A. 129) and his failure to restrict the flow was negligence (A. 138-139). Cutting back the flow in this context was a simple operational decision. The Appellate panel, reversing the finding regarding Sheldon's authority, stated that the decision not to cut back the flow under the then existing circumstances was a discretionary decision made by Sheldon's superiors and was immunized by the discretionary function exception (A. 17-19).

The District Court had before it on the issue of Sheldon's authority the live testimony of lockmaster Sheldon and head lockman Ryle opposed to that of their superiors Whitlock, Dickson and General Heiberg. After weighing all of the evidence, it found Sheldon's testimony more credible and held that he alone made the decision not to divert the flow from the hydroplant without instruction on this issue from any superior (A. 128).

The Appellate Court weighing the evidence of Sheldon and Ryle against that of their superiors Whitlock, Dickson and Heiberg came to the contrary factual determination as to who made the decision. (A. 19) This was a pure credibility issue. The District Court had the opportunity to hear the witnesses, view

them and make its determination as to their credibility. As this Court said in *Anderson*:

> "(B)ut when a trial judge's finding is based on his decision to credit the testimony of one of two or more witnesses, each of whom has told a coherent and facially plausible story that is not contradicted by extrinsic evidence, *that finding, if not internally inconsistent can virtually never be clear error.*" (Emphasis added) *Id.* at 575, 105 S.Ct. 1512.

The Appellate Panel also reversed the findings of the District Court that the Corps was negligent in; (1) failing to coordinate ice-passing activities between Markland and Meldahl; (2) failing to compensate for the immobilization of the submergible tainter gates; and (3) failing to pass ice at Markland.

Each of these issues is discussed in the section above dealing with the discretionary function exception and Petitioners will not burden this Court by repeating that discussion. Suffice it to say here that in each instance, the Appellate Panel fashioned its opinion by completely ignoring the regulations and policy that the District Court factually found governed operations at Markland. The Appellate Panel never considered the mandates of the regulations to pass ice as it arrived at Markland and to have "essential provisions for such passage."

The Appellate Court came to its own factual determinations that the (unprotected) Corps' negligence for nonuse of the auxiliary chamber was of "small" significance (A. 21); that the District Court's finding on causation was a "close" question (A. 23) and that the "unprotected" negligent acts of the government including the failure to conduct inspections of the Markland Pool and the inadequate training of personnel at Markland "standing alone were not substantial factors in causing the disaster." (A. 23) All of these findings involve either weighing of the evidence by the Appellate panel or a complete disregard of it. For instance, the Appellate Court had to weigh whether the inadequate training of Markland personnel was

responsible for their failure to put the tainter gates in an ice passing mode until January 25, by which time it was too late to alleviate the situation. Similarly, the failure to pass ice was also interrelated with the failure of Markland to conduct surveillance of the Markland pool and the negligence in permitting the auxiliary lock to become inoperable during the critical period.

The Appellate panel refused to defer to the fact findings of the District Court and rejected the principle that an appellate court must not overturn findings of the trier of facts simply because it is convinced that it would have decided the case differently.

This Court summed up the problem in *Anderson*:

> "(I)n addition, the parties to a case on appeal have already been forced to concentrate their energies and resources on persuading the trial judge that their account of the facts is the correct one; requiring them to persuade three more judges at the appellate level is requiring too much. As the Court has stated in a different context, the trial on the merits should be "the 'main event' . . . rather than a 'tryout on the road.' " *Wainwright v. Sykes*, 433 U.S. 72, 90, 97 S.Ct. 2497, 2508, 53 L.Ed.2d 594 (1977). For these reasons, review of factual findings under the clearly-erroneous standard — with its deference to the trier of fact — is the rule, not the exception." *Id.* at 575, 105 S.Ct. 1512.

CONCLUSION

For the reasons stated above, Petitioners Walker Towing Corporation and B-R River Services, Inc. respectfully request that a Writ of Certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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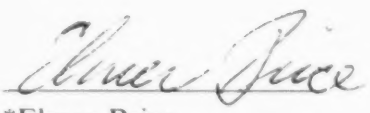

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